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MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

Public Service Commissioner BRAD
MOLNAR on behalf of Residents of Public
Service Commission District 2 and all others
served by NorthWestern Energy,

Plaintiff,

VS.

MONTANA PUBLIC SERVICE
COMMISSION and PENNSYLVANIA
POWER AND LIGHT OF MONTANA LLC,

Defendants.

Cause No.: CDV- 2006-372

**MEMORANDUM IN SUPPORT
OF MOTION OF PPL MONTANA, LLC
TO DISMISS COMPLAINT**

Preliminary Statement

PPL Montana, LLC (hereinafter "PPLM"), incorrectly referred to in the Complaint as "Pennsylvania Power and Light of Montana LLC," respectfully submits this memorandum in support of its motion pursuant to Mont. R. Civ. P., Rule 12(b) to dismiss the Complaint.

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1 legislature may validly provide for judicial review of agency decisions. . . ." Nye v.
2 Department of Livestock, 196 Mont. 222, 226, 639 P.2d 498, 500 (1982).

3 Here, any statutory right of judicial review is barred by the 30-day limitations period
4 in Mont. Code Ann. Section 69-3-402 (1) (2005). That statute provides that a party in
5 interest, dissatisfied with an order of the MPSC, may "within 30 days" file an action in
6 District Court "to vacate and set aside any such order" on the ground that it was "unlawful or
7 unreasonable...." The Complaint seeks to invoke this statute, as it alleges that the MPSC's
8 decision in Docket No. D.99.4.82 was unlawful and should be "set aside...." E.g., Complaint,
9 ¶¶ 1, 4; request for relief no 1. However, as admitted on the face of the Complaint (¶ 1), the
10 decision under attack was issued on "May 25, 1999." The time to seek District Court review
11 therefore expired on or about June 24, 1999. The Complaint was not filed until almost 7
12 years later.

13 The failure to comply with the statutory period is jurisdictional. See Bradco Supply
14 Co. v. Larsen, 183 Mont. 97, 102, 598 P.2d 596, 599 (1979), holding that when plaintiff
15 failed to comply with a comparable 30-day limitations provision, for judicial review of an
16 agency decision under the Montana Administrative Procedure Act ("MAPA"), "the District
17 Court had no jurisdiction to hear the case." Even where a plaintiff missed the MAPA
18 deadline by "two days," the Montana Supreme Court has held the statute jurisdictional and
19 dismissed the complaint. Udelhoven, 1999 MT 192, ¶ 4, 295 Mont. at 359, 983 P.2d at 970,
20 971, 972. There is no principled basis for a different result here, where the plaintiff is
21 almost 7 years late.

22 The only other provision that might afford a right of judicial review is § 2-4-702 of
23 MAPA, which also contains a 30-day limitations period. § 2-4-702(2)(a), MCA. Moreover,
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1 MAPA is inapplicable because, by its express terms, it permits review only of "contested
2 case" decisions. §2-4-702(1)(a), MCA. A "contested case" is one in which a determination
3 is made "after an opportunity for hearing." § 2-4-102(4), MCA. Here, there was no
4 "contested case" hearing, as the Complaint (§ 9) essentially concedes. In any event, even if
5 this were a contested case and MAPA applied, (aside from being untimely) plaintiff has not
6 "exhausted all administrative remedies available within the agency" as required by § 2-4-702
7 (1)(a). B.G.M. Enterprises v. State of Montana, Department of Social and Rehabilitation
8 Services, 40 St. Rep. 1827, 673 P.2d 1205 (1983) (party who challenged agency
9 disallowance of certain claimed costs, but failed to file timely objections with administrative
10 agency was barred from seeking judicial review because it failed to exhaust administrative
11 remedies.) Similarly, here, Molnar never sought to intervene in opposition to the application
12 by PPLM and MPC that culminated in the May 25, 1999 order. See Mont. Admin. R.
13 38.2.2403 (2005).

14 **II. PLAINTIFF LACKS STANDING TO SUE**

15 In McTaggart v. PSC and MPC, 168 Mont. 155, 158, 541 P.2d 778, 780 (1975), the
16 Montana Supreme Court held that a member of the Public Service Commission lacked
17 standing to sue the Commission "because [1] he was part of the decision-making process; [2]
18 was not a party in interest dissatisfied with the action of the Commission within the meaning
19 of the statute; and [3] should not be permitted to appear on antagonistic and opposite sides of
20 the same case." We address [2] and [3] first and then turn to [1].

21 First, as discussed above, Molnar apparently bases his claim on § 69-3-402, MCA,
22 which was known as § 70-128, R.C.M. 1947 when McTaggart was decided. Section 69-3-
23 402 (1) grants standing to appeal to the District Court to "[a]ny party in interest being
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1 dissatisfied with an order of the commission fixing any rate, fare, charge, classification or
2 joint rate" Like McTaggart, Molnar is not "a party in interest ... dissatisfied with an order
3 of the commission" because, as McTaggart held, "A Commissioner's personal interest in
4 seeing his view upheld has been held insufficient to give him standing to sue in a variety of
5 situations." Id., discussing Mortensen v. Pyramid Savings & Loan Association of
6 Milwaukee, 53 Wis.2d 81 191 N.W.2d 730 (1971) and State ex rel Basista v. Melcher, 118
7 Ohio App. 37 (1963). Numerous cases following and citing McTaggart have reached the
8 same conclusion. See, e.g., Newman v. Richland County Historical Preservation
9 Commission, 480 S.E.2d 72 (S.C. 1997) (dissenting member of governing board of Historic
10 Preservation Commission lacked standing to bring declaratory judgment action challenging
11 validity of commission resolution directing property transfers and commission dissolution);
12 Munhall v. Inland Wetlands Commission, 602 A.2d 566 (Conn. 1992) (two members of
13 commission who dissented from grant of application to extend wetlands permit lacked
14 standing to bring administrative appeal in Superior Court); Cohen v. Board of Selectmen,
15 376 A.2d 853 (Me. 1977) (selectmen who dissented from board's grant of license to build
16 wharf lacked standing to appeal from the issuance of the license).

17 Second, Molnar "should not be permitted to appear on antagonistic and opposite sides
18 of the same case." 168 Mont. at 158, 541 P.2d at 780. Like McTaggart, Molnar is "a member
19 of the Commission and was no less so by failing to name himself " as a defendant. Id.
20 Molnar "is also the plaintiff in the case. Chaos would result if any dissenting member of a
21 state board or agency had standing to appeal from any board or agency decision." Id.

22 Third, although Molnar (unlike McTaggart) was not on the PSC at the time it issued
23 the order he seeks to challenge, this should not change the outcome. Chaos would also result
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1 if every time a new member joined the Commission all of its prior decisions became
2 vulnerable to legal assault. "[A]n individual member of a governing body does not have the
3 power to institute lawsuits or file appeals in his or her own name. Such a result could create
4 judicial as well as political chaos." Newman, supra, 480 S.E.2d at 83 (internal quotation
5 marks omitted). Molnar's predecessor, who participated in the decision under attack, had no
6 legal standing to challenge it in court, and there is no principled reason Molnar should have
7 greater legal rights than his predecessor.

8 McTaggart's holding is dispositive. The complaint should be dismissed.

9 **CONCLUSION**

10 Because plaintiff's complaint is time-barred and because plaintiff does not have
11 standing, defendant PPLM respectfully requests that its motion to dismiss the complaint be
12 granted.

13 Dated this 20th day of June, 2006.

14 CROWLEY, HAUGHEY, HANSON,
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16 By 

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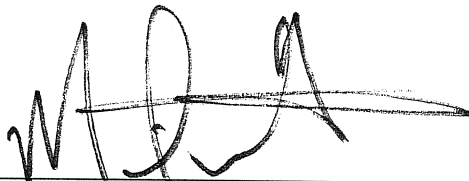
CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of June, 2006, I mailed a true and correct copy of the foregoing document, postage prepaid, to the following:

Brad Molnar
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Helena, MT 59620

Brad Molnar (duplicate)
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Robin McHugh
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